PUBLIC PROSECUTOR

v.

LIN LIAN CHEN

HIGH COURT MALAYA, KUALA LUMPUR
MOHTAR ABDULLAH J
[FEDERAL TERRITORY CRIMINAL TRIAL NO. CR 58-37-87]
15 SEPTEMBER 1990

CRIMINAL PROCEDURE: *Cautioned statement - Circumstances under which defence can tender cautioned statement if cautioned statement not tendered by prosecution - "Being in possession of the investigating officer".*

EVIDENCE: *Criminal law - Expert witness - Procedure to be followed for such expert evidence to be admissible - Sections 45, 57 Evidence Act 1950 - Sections 425, 399 Criminal Procedure Code.*

The accused L was charged with the offence of trafficking in heroin under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act). L was acquitted and discharged on the basis that the prosecution had failed to establish a *prima facie* case firstly as they had failed to prove the expertise of the chemist and secondly the existence of reasonable doubt.

Held:

[1] The requirements necessary for the giving of evidence by expert witnesses is as stated by Hashim J in *Wong Chop Seow v. PP*.

[2] (a) The Court cannot, by the mere fact that a witness is a government chemist of some standing, hold that the witness in question is an expert in the particular field of expertise in the case before it, see s. 57 of the Evidence Act; in this case, the prosecution had failed to establish that PW2 was an expert within the ambit of s. 45 of the Evidence Act.

(b) Under s. 399 of the Criminal Procedure Code (CPC) the report of such an expert is inadmissible if the expert himself is called to give oral evidence.

(c) Although s. 425 of the CPC permits the Court to recall and re-examine any witness, it is not just and fair to allow the prosecution, after it has closed its case, to make emergency repairs to defects in its case caused by its own lack of care in the conduct of its own case.

[3] Any witness (including an investigating officer) who has any document (including a cautioned statement of an accused person) which is within his possession or power which is required by the defence and which is material to the defence, is bound to produce it, the defence has the right to establish reasonable doubt on the prosecution case during the case for the prosecution itself, so that if no *prima facie* case is thereby established, the accused may be acquitted and discharged without his defence being called.

[4] (a) The facts in *Mohd. Noor b. Jantan's* case are clearly distinguishable and the Federal Court has not expressly prohibited the production of the cautioned statement of an accused person through the investigating officer; the essence of rulings in that case is that the defence can introduce such cautioned statement in evidence during the prosecution case as a defence exhibit.

(b) It is neither fair nor just to deny the accused the opportunity to introduce such favourable evidence central to his defence at the earliest possible stage during the prosecution case if there are other lawful means for him to introduce such evidence.

[5] The facts disclosed in the cautioned statement bore striking similarities to the facts disclosed in the course of the prosecution case which tended to show that L's explanation in the cautioned statement could probably or reasonably be true.

[Accused acquitted and discharged.]

Cases referred to:
Wong Chop Seow v. PP [1965] 1 MLJ 247
Saw Thean Teik v. Regina [1953] 19 MLJ 124
Mohd. Noor bin Jantan v. PP [1979] 2 MLJ 289

Legislation referred to:
Criminal Procedure Code, ss. 399, 425
Criminal Procedure Code (Cap 21) (Straits Settlement), s. 427
Dangerous Drugs Act 1952, ss. 37(d), (da), 39B(1)(a), (2)
Evidence Act 1950, s. 45, 57

For the public prosecutor - K.K. Wong, DPP
For the accused - Manjeet Singh

JUDGMENT

Mohtar Abdullah J:

The accused was charged as follows:

> Bahawa kamu pada 28 Mac 1987 jam lebih kurang 2.40 petang di tempat letak kereta di Stadium Negara, Jalan Stadium, di dalam Bandaraya Kuala Lumpur, Wilayah Persekutuan, telah mengedar dadah berbahaya, iaitu heroin seberat 578.04 gram dan oleh itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (Disemak 1980) dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama,

At the close of the case for the prosecution, I held that the prosecution had failed to establish a *prima facie* case against the accused which, if unrebutted, would warrant his conviction. Accordingly, I acquitted and discharged the accused without calling on him to enter his defence. The Public Prosecutor, being dissatisfied with this order, has now appealed against the acquittal and discharge of the accused.

I was satisfied that the prosecution had failed to prove a *prima facie* case on two reasons; *viz.*:

(a) the failure to prove the expertise of the chemist; and/or
(b) the existence of reasonable doubt cast during the prosecution case itself.

The prosecution had elected to call Mr. Primulapathi Jaya, the Government Chemist (PW2) to give expert opinion that the drug examined by him (and which formed the subject matter of the charge) was heroin.

All that the prosecution had adduced to show that PW2 was an expert was PW2's testimony, as follows:

> I have been with the chemistry department for 13 years. I have a B.Sc. (Hons.) degree majoring in chemistry. I have done a diploma in blood serology.

That's all! Apart from the fact that PW2 was a graduate in chemistry with 13 years experience in the chemistry department, no evidence was led at all by the learned Deputy Public Prosecutor that this witness had the necessary experience or the expertise in the analysis of

dangerous drugs, especially heroin, or for that matter, had given evidence in Court on the analysis of drugs, especially heroin, or that his expert testimony had been accepted by the Court. Therefore, had the prosecution in this particular case proved PW2 to be an expert whose opinion and finding could be considered and accepted by the Court? Strictly speaking, the prosecution had failed in law to provide the basis for the reception of the expert opinion of PW2 under s. 45 of the Evidence Act 1950.

The learned Deputy Public Prosecutor was either unaware or unmindful of the salutary advice of Hashim J in *Wong Chop Seow v. Public Prosecutor* [1965] 1 MLJ 247:

> May I, with respect, suggest that to avoid confusion the expert witness should give his evidence as follows. He should first state his qualifications as an expert. He should then state that he had given evidence as an expert in such cases and that his evidence has been accepted by the Courts.

It is only after basic steps have been established that the expert witness then proceeds to describe the subject matter examined by him and accordingly gives his opinion based on such examination.

In other words, the prosecution should first establish the expertise of the witness. The opinion which he is asked to give must relate to a matter concerning which his special knowledge will assist the Court. The expert may not give an opinion on matters outside the field of his expertise.

Although the Court takes judicial notice of the common fact that a Government Chemist is called upon to examine and analyse exhibits sent to the chemistry department by the police and other law enforcement agencies, it cannot, by the mere fact that a witness is a Government Chemist of some standing, hold that the witness in question is an expert in the particular field of expertise in the case before it. A bachelor of science (Honours) degree, majoring in chemistry, does not necessarily imply that the witness concerned has an expert knowledge of heroin - nor does 13 years experience in the chemistry department similarly clothe the witness with expertise in the analysis of heroin! In our present case, the prosecution need to show that PW2 has the expertise, or at the very least some experience, in the analysis of heroin to qualify him as an expert. The particular field of expertise required in this case is the analysis of dangerous drugs, principally heroin - but all that the prosecution had shown was that PW2 was an expert in blood serology!

Section 57 of the Evidence Act which categorises all facts which a Court can take judicial notice of does not help the prosecution to overcome this legal or technical defect. The Court cannot take judicial notice that a Government Chemist *per se* is an expert in the analysis of any dangerous drugs under the Dangerous Drugs Act! Even though I have the highest opinion and respect for PW2, I cannot in a criminal trial on a fundamental issue affecting the guilt or otherwise of the accused, allow my personal opinion of this witness to influence my judgment on the legal issue of the reception of such expert evidence. The Court cannot assist the prosecution to prop up its case when the prosecution had itself failed to provide the basic foundation for the proper construction of its case.

I am not unmindful of the right of the prosecution, under s. 399 of the Criminal Procedure Code, subject to the conditions stated therein, to tender or produce the chemist report *in lieu* of calling the chemist. In such a case, the chemist report would be admissible in evidence, including of course the chemist's findings that the drug analysed by him is heroin. However, the prosecution had elected to call the chemist (PW2) to give his testimony in Court, and by such election, the prosecution was bound by the rules of evidence to establish that the chemist called to give expert evidence was indeed an expert within the ambit of s. 45 of the Evidence Act. This, unfortunately, the prosecution had failed to do.

In *Saw Thean Teik v. Regina* [1953] 19 MLJ 124, Spencer Wilkinson J, in dealing with s. 427 of the Straits Settlement Criminal Procedure Code (Cap. 21), which is in *pari materia* with s. 399 of our Criminal Procedure Code (FMS Cap. 6), observed as follows:

> In the first place the medical officer having been called as a witness his report should not have been put in. I think it is quite clear from the wording of s. 427 of the Criminal Procedure Code that under that section a medical officer's report is admissible only if that officer is not called as a witness. When a medical officer is giving oral evidence then of course any notes which he may have made at the time of his examination he can refer to refresh his memory. Moreover, if his report is made at about the time when his examination took place the report could be put in not as primary evidence of its contents but to corroborate the oral evidence already given under s. 157 of the Evidence Ordinance.

He also observed:

> The report of the Senior Government Chemist which was put in was also in my view inadmissible for the reason that he was called as a witness and no notice was given under s. 427 of the Criminal Procedure Code of the prosecution's intention to use the report. I do not attach much importance to this point, because I have no doubt that if he had been properly examined his evidence would have been identical with the contents of his report. Technically, however, it is wrong for a witness in a criminal case to produce a report as a substitute for oral evidence. Clearly, if the witness is in the witness box the best evidence is his oral evidence as to what he saw or discovered. Where witnesses of this kind are brought to Court their reports should only be used, if at all, either to refresh memory or as corroboration.

These observations remain as valid today as they were in 1953.

At the close of the prosecution case, in reply to the submission of the learned Counsel for the defence on this point, the learned Deputy Public Prosecutor urged the Court to recall PW2, the chemist, in order that his qualifications as an expert could be established. Although s. 425 of the Criminal Procedure Code permits the Court to recall and re-examine any witness if his evidence appears to the Court to be essential to the just decision of the day, I exercised my discretion not to recall PW2 as the prosecution had already closed its case. It is not just and fair to allow the prosecution, after it has closed its case to make emergency repairs to its defects in its case caused by its own lack of care in the conduct of its own case. In an adversary trial, the defence is entitled to the benefit of any doubt created in the prosecution case by the prosecution itself!

In the circumstances I held that the prosecution had failed to prove, by proper expert evidence, that the drug in question was heroin, a dangerous drug listed in the First Schedule of the Dangerous Drugs Act. On this issue alone, the whole of the prosecution case had collapsed.

However, even assuming that the law allowed me to accept PW2 as an expert witness and accordingly, there was no doubt that the prosecution had proved that the drug recovered was heroin, I was satisfied that the prosecution had still not proved a *prima facie* case against the accused, for the reasons which I shall now enumerate.

The prosecution had established that on 28 March 1987 at about 2.15 p.m., acting on information received, a party of police officers, headed by ASP Yusof bin Mohamed (PW3), laid an ambush at the Stadium Negara car park, Jalan Stadium, Kuala Lumpur. At about 2.40 p.m. the accused was seen driving a car (Honda Accord, bearing Registration Number DP 5212) into the car park. The accused parked his car and switched off the engine. PW3 immediately gave the prearranged signal to his men to close in on the accused. PW3 also rushed to the accused and grabbed the car keys. He identified himself as a police officer and ordered the

accused to come out of the car. The accused was then handcuffed. On the floor in front of the left rear seat of the car, PW3 found a plastic bag (Exhibit P5). Inside this plastic bag was another plastic bag containing six newspaper packages.

The car was later brought back to the Anti-Narcotics Division (Cawangan Anti Dadah) where a further check on the car led to the discovery of the following exhibits:

(a) a newspaper package in the console box; and

(b) a cigarette packet on the dashboard.

All the seven packages (six found in the plastic bag on the floor of the car and one found in the console box) and the cigarette packet contained a total of 578.94 grams of heroin, as analysed by the chemist PW2. Six cigarettes found in the cigarette packet also contained traces of heroin.

Assuming, as I indicated earlier, that I accept PW2's testimony as an expert that these drugs analysed by him were in fact heroin, the evidence as to the discovery of the heroin in this car in the custody or under the control of the accused would raise the statutory presumption under s. 37(d) of the Dangerous Drugs Act 1952, whereby the accused would be deemed to have been in possession of the heroin and to know its nature. Furthermore, under s. 37(da), the heroin being in excess of 15 grams, the accused would be deemed to be trafficking the said heroin.

However, during the prosecution case itself the following facts were disclosed:

(a) that important documents, *viz*, the registration card of the car DP 5212 and the radio licence in respect of the same car, both in the name of Lim Hooi Yong, were found in the glove compartment of the said car;

(b) that several business cards bearing the name James Goh Liong Sin were also found in the same glove compartment;

(c) that this car, though registered in the name of Lim Hooi Yong, actually belonged to James Goh Liong Sin;

(d) that one Koay Nian Taik was registered in Room 414, Hotel Emerald from 7.50 p.m., 27 March 1987 to 1.50p.m., 28 March 1987, and that the registration number of car DP 5212 was recorded in the Hotel Register (Exhibit P23) against that room;

(e) that during interrogation by PW3, the accused had mentioned to PW3 that James Goh was at the Emerald Hotel.

The learned Counsel for the defence applied to introduce, through the investigating officer (PW7), the cautioned statement made by the accused to inspector Lai Joo Wah who was not called by the prosection. The learned Deputy Public Prosecutor objected, citing the Federal Court decision in *Mohd. Noor bin Jantan v. PP* [1979] 2 MLJ 289. In that case, one of the questions reserved for the determination by the Federal Court was "whether or not the defence is entitled in law to cause the prosecution to tender as evidence the cautioned statement recorded from the accused person during the course of the case for the prosecution when the prosecution does not intend to introduce it as part of the prosecution case?"

Suffian LP said:

> So in our judgment the answer to question (1) is this: The prosecution is free to tender or not in evidence the cautioned statement; but if the recording officer gives evidence the defence is entitled to cause him to tender it in evidence even though the prosecution does not itself want to introduce it as part of its case. If the recording officer is not called by the prosecution, he must be called by the defence during the course of the defence case for this purpose,

The learned Deputy Public Prosecutor contended that the cautioned statement cannot be introduced in evidence through any other officer except the recording officer. I am bound, by judicial precedent, to follow the decision of the superior Court. However, two principles immediately come to mind:

(a) that the defence is entitled, through cross-examination of prosecution witnesses, to put its case at the earliest possible stage during the prosecution case; and

(b) that any exhibit can be produced by the maker (e.g., the recording officer) or by any person in whose possession or power the exhibit presently is (e.g., the investigating officer) or by any person who originally recovered the said exhibit (e.g., the officer who conducted the raid or search).

In the course of police investigation, the investigating officer, who has the conduct of the investigation of a particular case assigned to him, will normally keep in his possession, or has the custody and control of, all exhibits in connection with the case. It is common practice in our Courts for the prosecution to tender exhibits through the investigating officers. For example, a chemist report is normally tendered in Court, under s. 399 of the Criminal Procedure Code, through the investigating officer after evidence has been led that the said officer had either personally served, or caused to be served, a copy of the said report on the accused not less than 10 clear days before the commencement of the trial. The investigating officer produces the document because it is in his possession in the course of his official duties. Such documentary evidence is marked and kept in what is normally referred to as the 'D' Folio in the investigation file.

Mohd. Noor bin Jantan must be viewed in the light of the observation stated by Suffian LP himself:

> ... in our judgment it is immaterial whether or not the statement is a public document - for the principle is that a witness who has any document which is within his possession or power which is required by the defence and which is material to the defence, is bound to produce it; and this rule applies whether or not the document is public or private - save that in the case of a document within the possession or power of Government, Crown privilege may in certain circumstances be claimed. It is not suggested that the cautioned statement here is protected by Crown privilege.

In the present case, the investigating officer had the cautioned statement "within his possession or power". His evidence was as follows:

> Saya ada suruh Inspektor Lai Joo Wah pada 29 Mac 1987 jam 1.20 petang untuk mengambil percakapan beramaran tertuduh. Setelah percakapan beramaran itu diambil, ianya telah diserahkan kepada saya jam 3.30 petang hari yang sama. Percakapan ini ada di dalam fail penyiasatan.

The prosecution was not interested in the cautioned statement of the accused recorded by Inspector Lai Joo Wah. The learned Deputy Public Prosecutor did not call Inspector Lai nor indicate to the Court that he would be calling the said officer. In fact, Inspector Lai was offered to the defence at the close of the case for the prosecution. The defence has the right to establish reasonable doubt on the prosecution case during the case for the prosecution itself, so that if no *prima facie* case is thereby established, the accused may be acquitted and discharged without his defence being called. The facts in *Mohd. Noor bin Jantan*, in my view, are clearly distinguishable, and I do not think that the Federal Court in that case has expressly prohibited the production of the cautioned statement of an accused person through the investigating officer. The essence of the rulings in that case is that the defence can introduce such cautioned statement in evidence during the prosecution case as a defence exhibit! Otherwise, all that the prosecution need do to frustrate the defence and

prolong the trial (assuming that there will be a *prima facie* case without such cautioned statement) is to close its case without calling the recording officer! In my view, it is neither fair nor just to deny the accused the opportunity to introduce such favourable evidence central to his defence at the earliest possible stage during the prosecution case if there are other lawful means for him to introduce such evidence. It is trite law that statutory presumption raised during the prosecution case may even be rebutted during the prosecution case itself. If the accused can raise credible evidence to rebut, on a balance of probability, the presumption of possession and trafficking in a dangerous drug at the close of the prosecution case, then he is entitled to an acquittal if at that stage no *prima facie* case is thereby established.

Following Suffian LP's observation, for the purpose of the present case, the principle can be restated as follows:

> the principle is that any witness (including an investigating officer) who has any document (including a cautioned statement of an accused person) which is within his possession or power which is required by the defence and which is material to the defence, is bound to produce it ...

In the circumstances, I allowed the application of the defence to produce the cautioned statement of the accused through the investigating officer (PW7) and, again following *Mohd. Noor bin Jantan*, it was marked as defence Exhibit D22.

At the close of the case for the prosecution, I considered all the available evidence, including the cautioned statement (D22). The cautioned statement, made one day after the accused's arrest, was exculpatory in nature and made references to Ah Schen (as the owner of the Honda Accord DP 5212) and Ah Tik, both staying at room 414, Hotel Emerald. The accused described how he was asked by one Mr. Soh, a friend of Ah Schen, to drive the car to the car park at Stadium Negara to await an old man and how the plastic bag containing the offending drug was placed in the car by the old man. The facts disclosed in the cautioned statement bore striking similarities to the facts enumerated earlier pertaining to the car DP 5212, James Goh Lian Sin and Koay Nian Taik of room 414, Hotel Emerald, Kuala Lumpur. These facts disclosed in the course of the prosecution case tended to show that the accused's explanation in his cautioned statement as to the circumstances whereby he came to be driving the car could probably or reasonably be true. On all the evidence before me, I was fully satisfied that sufficient reasonable doubt had been cast by the defence during the prosecution case itself as to the knowledge and possession of the said dangerous drugs by the accused.

In conclusion, on both reasons (i.e., failure to prove the expertise of the chemist and the existence of reasonable doubt cast during the prosecution case itself), considered alternatively or together, I found that the prosecution had failed to establish a *prima facie* case against the accused. I accordingly acquitted and discharged the accused without calling upon him to enter on his defence.

Also found at [1990] 2 CLJ 1020